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TENAGA NASIONAL BHD

v.

TAIKO PLANTATIONS SDN BHD

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HIGH COURT MALAYA, IPOH
SU GEOK YIAM J
[CIVIL SUIT NO: 22-180-1994]
7 OCTOBER 2010

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PUBLIC UTILITIES: *Electricity - Charges - Under billing - Shortfall in billing for electricity consumed over five years and two months - Faulty electricity meter - Whether meters tampered with - Whether meters fixed and checked routinely - Whether readings on meter and amounts in monthly bills correct - Whether faults in meter due to plaintiff's negligence*

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- Whether plaintiff estopped from claiming for shortfall in billing - Whether claim illegal and barred by limitation

In the instant action, the plaintiff sued the defendant in the sum of RM276,397 which was the alleged amount owed by the defendant for the usage of electricity supplied by the plaintiff. The plaintiff alleged that the connections at the electricity meter in the defendant's premises ('Wisma Taiko') were faulty resulting in the defendant having been under-billed for the electricity it had actually consumed over a period of five years and two months from 13 December 1986 until 17 February 1992 ('the material time'). The plaintiff based its claim on the testimony of PW2, who testified that when he carried out a routine inspection at Wisma Taiko, he found two faults in the wiring connections at the electricity meter and he rectified the same immediately. PW2 said he was instructed by his superior to install a test meter at the site for a few weeks to simulate the fault which had previously existed in order to determine if there was any difference in the reading of electricity usage between the test meter and the meter he had rectified. The test apparently showed that the defendant had been under-billed for the amount of electricity actually consumed during the material time. PW2, however, was the only eyewitness to the alleged faulty connections. He did not inform the defendant's in-house electrical chargeman or engineer about what the fault actually was and there were no photographs taken or other documentary or other corroborative evidence to support his allegation about the faults. The date, 13 December 1986, in the claim was the date the electricity meters at Wisma Taiko were replaced by the plaintiff while 17 February 1992 was the date the

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alleged faults in the meters were rectified by PW2. It was undisputed that the meters were not found to have been tampered with as the seals originally placed by the plaintiff were intact and that during the material time the meters were inspected from time to time by the plaintiff's representatives. The defendant rejected the plaintiff's claim, *inter alia,* by alleging that: (i) PW2's evidence was unreliable; (ii) the plaintiff was not legally allowed to issue a special bill to claim for the amount claimed; (iii) the defendant was not responsible for any faulty connections in the meter; and (iv) the plaintiff's claim was barred by limitation, illegality, laches and estoppel. The defendant counterclaimed for a sum equivalent to the plaintiff's claim on the ground that the faults in the meter, if any, were caused by the plaintiff's own negligence. Prior to 1 September 1990 the plaintiff's predecessor was a statutory body governed by the Electricity Act 1949 and the Electricity Board (Supplies) Rules 1949 ('the Rules'). From 1 September 1990, the plaintiff became a public company and was governed by the Electricity Supplies Act 1990 and the Licensee Supply Regulations 1990 ('the Regulations').

Held (dismissing claim with costs and counterclaim with no order as to costs):

(1) The plaintiff had failed to prove on a balance of probabilities that the existence of the two alleged faults in the meter panel box of the defendant at Wisma Taiko at the material time. PW2's evidence was inconsistent and unreliable and therefore, the court disbelieved and rejected his evidence. Since the basis for the calculation of the sum claimed had fallen apart, the plaintiff had failed to prove the sum was correct and reasonable based on its usual calculations. (paras 124, 136 & 143)

(2) The defence of illegality succeeded. The law did not authorise the plaintiff to issue the special bill to make a retrospective claim in respect of the amount under-billed by the plaintiff over the material time. The court construed both r. 17(5) of the Rules and regs. 11(2) and 12(4) of the Regulations to mean that the plaintiff could issue a bill to claim for arrears of payment for electricity used for a period of one month only. If the legislature had intended to give the plaintiff power to issue a special bill to cover a period of more than a month, it would have provided for this in clear terms. (paras 144, 147 & 148)

(3) The meters at Wisma Taiko were installed by the plaintiff and inspected by its representatives from time to time. The replacement of the meters by the plaintiff on 13 December 1986, the signing of the new contract for supply of electricity, the issuance of monthly bills by the plaintiff under the new contract followed by due payment of the bills by the defendant, all amounted to a representation by the plaintiff to the defendant of the existence of a certain state of facts, *ie*, that the new meters were recording the consumption of electricity correctly and that the monthly bills issued to the defendant were correct. (paras 183 & 184)

(4) The plaintiff was guilty of culpable negligence because after the current transformers were installed, its personnel failed to check whether the electrical wiring in the sealed meter panel box was connected correctly and whether the readings of the meter were accurate. The meter was sealed by the plaintiff and the defendant had no possible means of verifying the accuracy or otherwise of the accounts stated in the monthly bills. The loss must therefore fall on the plaintiff as the defendant had acted on the representation that the monthly bills were correct. (paras 186 & 188)

(5) The plaintiff's claim ought to be dismissed on the grounds of limitation and laches. The claim for breach of contract was time-barred under s. 6(1)(a) of the Limitation Act 1953 as it dated back to 13 December 1986 whereas the writ was only filed on 14 November 1994. The plaintiff was also guilty of laches as there was unduly long delay on its part in discovering the alleged wrong wiring in an area which was completely within its domain and which was sealed off and inaccessible to the defendant's workers and agents. (paras 193, 194 & 195)

Case(s) referred to:

Dai-Ichi Electronics (M) Sdn Bhd v. Tenaga Nasional Bhd [1996] 1 LNS 47 HC ***(refd)***

Maritime Electric Company Ltd v. General Diaries Ltd [1937] AC 610 ***(dist)***

Public Textiles Bhd v. Lembaga Letrik Negara [1976] 1 LNS 120 FC ***(refd)***

Taranaki Electric-Power Board v. Proprietors of Puketapu 3A Block, Incorporated [1958] NZLR 297 ***(foll)***

Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd [1995] 1 LNS 244 HC ***(refd)***

Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd [1998] 2 CLJ 740 CA ***(foll)***

Legislation referred to:
Electricity Supply Act 1990, s. 24
Electricity (Board Supplies) Rules 1949, rr. 8, 16(2), 17(5)
Electricity Supply (Successor Company) Act 1990, s. 3
Evidence Act 1950, s. 114(g)
Licensee Supply (Amendment) Regulations 2002, regs. 11(1), (2), (3), 12(4)
Licensee Supply Regulations 1990, regs. 3(1), (5), 4, 7
Limitation Act 1953, s. 6(1)(a)

Companies Act 1867 [UK], s. 25
Public Utilities Act [Canada], ss. 16, 18

For the plaintiff - Ashok K Raman (Sabry Kassim with him); M/s Abu Talib Shahrom & Zahari
For the defendant - N Selvarajah; M/s Raj Selva & Co

Reported by Ashok Kumar

JUDGMENT

Su Geok Yiam J:

[1] On 14 November 1994, the plaintiff filed a writ of summons and statement of claim against the defendant to claim a sum of RM276,397 (the "said sum") being the balance of one-third of the actual consumption of electricity which it alleged that it had under billed the defendant for a period of five years and two months ie, from 13 December 1986 until 17 February 1992, interest on the said sum at the rate of 8% per annum calculated from 13 December 1985 until the date of full settlement, costs, and any other relief deemed suitable and fair by the court.

Facts And Background

[2] The facts and background of the plaintiff's claim against the defendant are, briefly, as follows:

[3] The plaintiff is the sole supplier of electricity to all users. It supplies electricity to individuals, bodies and companies in accordance with the provisions of the Electricity Supply Act 1990 (the "1990 Act"). The plaintiff was previously a statutory body known as the National Electricity Board (the "NEB") or Lembaga

A Letrik Negara ("LLN") in the national language which was set up under the Electricity Act 1949 (the "1949 Act"). The 1949 Act was formerly the Electricity Ordinance 1949. The Electricity (Board Supplies) Rules 1949 (the "1949 Rules") were made under the 1994 Act.

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[4] On 30 August 1990 the property, rights and liabilities to which the NEB was entitled or subject to were transferred to the plaintiff pursuant to s. 3 of the Electricity Supply (Successor Company) Act 1990.

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[5] The defendant is a private limited company. It is one of the many large power consumers of electricity supplied by the plaintiff. The business of the defendant is to act as an agent in the management of a number of plantation companies and their estates. The cost of electrical energy supplied to their principals is

D treated as an item of expenditure in order to determine the cost of the service which is provided to their principals.

[6] In its statement of claim dated 1 November 1994 the plaintiff alleges, *inter alia*, as follows:

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(3) On/about 30 July 1985 pursuant to a contract for the supply of Electricity No. 3748/85 entered into between the plaintiff and the defendant, the plaintiff agreed to supply electricity to the

F defendant in accordance with the agreed terms of the said contract.

(4) On 5 July 1990 a new contract for the supply of Electricity No. 4794/90 between the plaintiff and the defendant was executed by the plaintiff and the defendant by virtue of the change in the

G minimum monthly charges imposed on the defendant.

(5) On 17 February 1992 a routine inspection was carried out by the plaintiff on the defendant's premises and the plaintiff found that the electrical wiring at the defendant's premises was not accurate and the particulars are as follows:

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(i) The wiring to the volt element of the red phase Kwh meter was not connected resulting in no voltage on that element; and

(ii) The red phase wiring at sources S1 and S2 at the testing

I block was reversed.

(6) By virtue of those matters the meters on the defendant's premises are inaccurate and have only been recording 70% of the total consumption of electricity by the defendant.

(7) On 17 February 1992 the plaintiff repaired and rectified the electrical wiring on the defendant's premises.

(8) The plaintiff's claim is for a sum of RM276,397 which is the balance of the payment which the defendant has to pay to the plaintiff in accordance with the amount of electricity actually consumed by the defendant.

(9) Although the plaintiff has made repeated demands on the defendant to pay the said sum, the defendant has failed, refused/neglected to pay the said sum to the plaintiff.

[7] In its statement of defence and counterclaim dated 28 December 1994 the defendant disputed the plaintiff's claim on the ground that it has no control whatsoever over the wrongly connected electrical wiring. The defendant has relied on four defences, namely, negligence, estoppel, limitation and laches. The defendant also averred, *inter alia*, that pursuant to the 1990 Act the plaintiff has ceased to be a statutory public utility and that the plaintiff has become a public limited company which is listed on the Stock Exchange.

[8] The defendant also admitted that the 1st five year contract for the supply of electricity to the defendant by the plaintiff has expired and that the parties entered into a new contract on 17 July 1990. The new contract took effect only on 30 July 1990 upon the expiry of the old contract.

[9] The defendant further admitted that on 17 February 1992, the plaintiff's representative carried out an inspection on the defendant's premises during which he informed the plaintiff's employee that the electrical wiring was wrongly connected and that he had rectified the wrong connection. Subsequently, the plaintiff's representative informed the defendant's officer that he had installed a test meter to simulate the wrong connection in order to conduct comparative readings of the actual consumption of electricity on the defendant's premises ("Wisma Taiko").

[10] As a result of that the plaintiff arrived at a sum of RM322,464 (the "initial sum") being an estimate of the arrears of charges for the actual consumption of electricity which it had under billed the plaintiff arising from the wrong connection. Upon

A the defendant's refusal to pay the initial sum the plaintiff made some adjustment to the initial sum and reduced the initial sum to the said sum.

[11] The defendant also counterclaimed for a sum equivalent to
B the said sum which it alleged was caused by the negligence of the plaintiff, the plaintiff's agents and/or servants.

[12] In its reply and defence dated 22 February 1995 which was filed in response to the defendant's statement of defence and
C counterclaim, the plaintiff averred, *inter alia*, that the plaintiff has taken all necessary and reasonable steps to ensure that all the electrical installations at Wisma Taiko were in order and that the defendants' officer was informed immediately after the wrong connection was detected, that the calculation of the said sum is
D correct and reasonable based on its usual calculations in accordance with the existing regulations, that the plaintiff was not negligent, that the plaintiff's claim is legally valid and that the defendant's counterclaim is baseless because the defendant does not have a valid cause of action against the plaintiff.

E **[13]** On 31 October 2000 the court allowed the plaintiff's oral application to amend para. 1 of the statement of claim to state that the plaintiff is a public company limited by shares incorporated under the Companies Act 1965 (the "CA") and is the successor company to the National Electricity Board in
F accordance with the Electricity Supply (Successor Company) Act 1990 as appointed by the Minister pursuant to the Transfer Date Order 1990 made on 30 August 1990.

[14] On the same date the court also allowed the defendant's
G oral application to amend para. 1 of the statement of defence and counterclaim to admit para. 1 of the plaintiff's amended statement of claim and to add that the vesting of the property, rights and liabilities of the NEB in the successor company is subject to the relevant law.

H **[15]** On 27 November 2001 the defendant filed the amended statement of defence and counterclaim.

[16] On 2 July 2004 the plaintiff filed the amended statement of claim.

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Agreed Facts

[17] The statement of agreed facts dated 2 April 1999 and filed by the plaintiffs' solicitors states as follows:

(1) Defendant was supplied with electric power by the plaintiff on 30 July 1985 pursuant to Supply Contract No. 3748/85.

(2) Defendant received 3 phase supplies of 415 v voltage, on tariff "B" which is commercial tariff.

(3) Consumption of electric power in defendants premises was recorded by using two (2) unit Kwh 3 phase meter. One meter is the Main Meter and the other is the Test Meter.

(4) Electric power unit consumed in the premises of the defendant was recorded monthly by plaintiff's representatives before monthly bills were issued to the defendant beginning from the time when supply commenced specifically from 13 December 1986 until 17 February 1992 (hereinafter referred to as the "material time"). The defendant has settled all monthly bills during the material time within the stipulated period.

(5) On 13 December 1986 both kwh meters ie the Main Meter and the Test Meter were replaced due to discrepancies in the reading between both meters which exceeded 3%.

(6) On 5 July 1990 a new contract No: 4794/90 was signed by both plaintiff and defendant replacing contract No: 3748/85 due to the lowering of monthly minimum payment from RM1,012 to RM6 effective from 30 July 1990.

(7) The installation of the meter in defendant's premises was under the control and power of the plaintiff during the material time and was inspected by plaintiffs representative from time to time.

(8) On 17 February 1992 an inspection was conducted by plaintiffs representatives on the meter installation in defendants premises. This inspection was conducted after informing Mr Cheah Fook Chye the Electrical Chargeman of the defendant.

Disputed Facts

[18] The statement of disputed facts dated 2 April 1999 and filed by the plaintiff's solicitors states as follows:

(9) The inspection conducted on 17 February 1992 was supervised by Mr Cheah Fook Chye the Electrical Chargeman of the defendant.

(10) After the inspecting the installation it was discovered that the wiring was faulty. The faults were:

(a) Red-phase wire was wrongly connected and

(b) The Current Transformer terminal was inversely connected.

(11) The effect of (a) is that certain amount of power consumed will not be recorded because the red wire was not connected to voltage coil in the meter. However it did not affect supplies because the effected wiring did not interfere with that of supply.

(12) The faults were corrected in front of Mr Cheah Fook Chye. After repair the meter concerned moves faster.

(13) Plaintiff stand is that the wiring of the meter installation in the defendants premises was faulty. After due correction and after determining the differences in the power units recorded before and after the change in the wiring, plaintiff was able to assess and billed the defendant a sum of RM276,397.68. This represents the amount consumed (after rebate) by the defendant which was not recorded by the meter due to the faults.

(14) Another meter of the same series was installed by Mr Chan Tuck Keong for purpose of comparing the readings and consumption.

(15) Comparison was done by way of simulation reenacting the situation before correction was made that is, without the red phase wire.

(16) This comparison was for the purpose of showing the difference. The difference was between the meter correctly installed with that of the wrong one.

(17) The result of the test was that there was difference and that the defendant was underbilled by 1/3.

(18) Comparisons of consumption before and after the meter was repaired (17 February 1992) was also conducted by the plaintiff. The result was that the average daily consumption by the defendant after repair was 1837 unit as compared before that which was 1283 unit.

(19) Plaintiff discovered that the defendant was only billed 2/3 of the actual consumption and the defendant owe the plaintiff the remaining 1/3.

(20) The arrears was calculated by the plaintiff which amounted to RM322,464.

(21) Plaintiff in their letter dated 10 July 1992 demanded the payment of that amount from the defendant. However *vide* their letter dated 14 September 1992 plaintiff reduced the amount to RM276,397.68. The relevant Bill was attached with the said letter.

The Trial

[19] On 16 August 1999, the full trial commenced before Clement Skinner J (as His Lordship then was). The plaintiff called two witnesses, PW1 and PW2.

[20] On 15 August 2000, I was directed by the then Right Honourable Chief Judge of Malaya to continue with the full trial of the plaintiff's claim.

[21] On 24 August 2000, in order to save judicial time I directed the plaintiff's learned counsel to file the witness statements of the plaintiff's witnesses who have yet to be called and also of PW2 who had not yet completed giving his evidence. Unfortunately, this direction was not complied with.

[22] On 31 October 2000, the full trial continued with PW2's testimony.

[23] On 2 November 2000, the full trial continued with PW2's testimony.

[24] On 8 February 2001, the full trial continued with PW2's testimony.

[25] On 9 February 2001, the full trial continued with PW2's testimony.

[26] On 24 August 2000, the full trial continued with PW2's testimony.

[27] On 28 March 2001, the full trial continued with PW2's testimony.

[28] On 27 and 28 November 2001, the full trial continued with PW3's and PW4's testimony.

[29] On 1 June 2002, I was transferred to the Penang High Court.

[30] On 15 and 16 August 2002, the full trial continued with PW4's and PW5's testimonies.

[31] On 22 August 2003, the full trial continued with PW5's testimony.

[32] On 23 August 2003, the learned plaintiff counsel was sick so the full trial had to be adjourned to 16 October 2003.

[33] On 16 October 2003, the full trial continued with PW5's testimony.

[34] On 20 November 2003, the full trial continued with PW6's testimony.

[35] On 21 November 2003, the full trial continued with PW6's testimony.

[36] On 2 July 2004, the case for the defendant commenced with the defendant's learned counsel calling its first witness, DW1.

[37] On 15 June 2006, the full trial continued and I heard the testimonies of DW2 and DW3.

[38] On 12 November 2009 the full trial concluded after I had heard the testimony of the defendant's last witness, DW4 and the defendant closed its case.

Decision Of The Court

[39] On the following day, on 13 November 2009, upon hearing and considering the submissions of and the authorities cited by the learned counsel for both the parties the court dismissed the plaintiff's claim with costs of RM30,000 and the defendant's counterclaim with no order as to costs (the "said decision").

[40] Being dissatisfied with the said decision the plaintiff has on 25 November 2009 filed a notice of appeal to the Court of Appeal against the said decision.

Observations Of The Court On The Unsatisfactory Conduct Of The Plaintiff's Learned Counsel

[41] Before stating the reasons why the court made the said decision the court would like to make the following observations on the manner in which the plaintiff's learned counsel conducted the plaintiff's case in the trial which the court found to be most unsatisfactory.

[42] The attitude of the plaintiff's learned counsel was very lackadaisical. The plaintiff's counsel was not diligent in prosecuting the plaintiff's case in court. Directions of the court for witness statements to be prepared were not promptly complied with. When the directions were finally complied with the results were shoddy. On one occasion when the court insisted that the court's directions be strictly complied with, the plaintiff's learned counsel attempted to engage in an argument with the court. This is clearly borne out in the notes of proceedings. The plaintiff's learned counsel also displayed a habit of coming late to court and on a number of occasions the court and the defendant's learned counsel and the defendant's representative had to wait for him.

[43] The plaintiff's learned counsel was also more interested in adducing the legal opinion of the plaintiff's solicitors pertaining to the legality of the plaintiff's claims when this matter should have been left for submissions.

[44] The court could not but arrive at the conclusion that the status of the plaintiff being the holder of the sole monopoly over the supply of electricity in the country had caused the plaintiff's learned counsel to be indifferent to the plight of its consumers including the defendant and also indifferent to his duty to the court which had the onerous task to hear and dispose off cases expeditiously in order to assist in the clearing of the backlog of old cases pending before the courts.

Reasons For The Said Decision

[45] The reasons why the court made the said decision are as follows:

[46] It is trite law that he who alleges must prove and in a civil case the standard of the burden of proof is on the balance of probabilities.

[47] Having heard the witnesses and considered the documentary evidence in the light of the submissions of and the cases cited by both learned counsel, the court was satisfied that the plaintiff has failed to prove on the balance of probabilities that there were two faults in the electrical wiring in the meter panel box at Wisma Taiko, ie, that the red phase wire was wrongly connected and that the current transformer terminal was inversely connected, that the calculation of the said sum was correct and reasonable based on its usual calculations and that it was legally entitled to issue a special bill to claim the said sum from the defendant. The court was satisfied that the defendant has proven on the balance of probabilities it's defences of estoppel by representation, estoppel by negligence, illegality, limitation and laches against the plaintiff.

[48] The plaintiff has called six witnesses. They are PW1, Raja Badiuzzaman bin Raja Omar ("Raja Badiuzzaman"), PW2, Chan Tuck Keong, PW3, Jamal bin Abdul Ghani, PW4, Jamal Abdul Nasir bin Abdul Manan, the Manager of TNBD, a subsidiary of the defendant, PW5, Ir Hj Mohd Yusof Sanusi bin Khalidin and PW6, Maysnan bin Hamzah.

[49] The defendant has called four witnesses. They are DW1, Cheah Fook Chye ("Mr Cheah"), DW2, Yew Voon Chong, DW3, Lee Thart Wah and DW4, Chew Chaw Fong @ Chow Chew Hoong.

[50] The plaintiff's case is as follows:

[51] On 11 December 1986, Raja Badiuzzaman, the Meters and Services Manager, gave instructions for the change of two meters at Wisma Taiko. On 13 December 1986 the two meters were changed. In their place two new meters were installed. The reason for the change in the two meters was because there was a difference of more than 3% between the readings of the main meter and the check meter and the discrepancy was noticed from June 1986 until the two meters were changed on 13 December 1986.

[52] On 17 February 1992, PW2, Chan Tuck Keong, went to Wisma Taiko together with his two assistants to conduct a 100% check on the meter panel in the switchboard room. He was instructed to do so by his engineer, Encik Jamal bin Abdul Ghani, PW3. When they arrived at Wisma Taiko, he called Wisma Taiko's electrical chargeman, DW1, Mr Cheah Fook Chye

("Mr Cheah"). The reason is because Mr Cheah was holding the key to the door of the switchboard room. He told Mr Cheah that he wanted to inspect the meter panel in the switchboard room.

[53] PW2's evidence that he went to Wisma Taiko and informed Mr Cheah that he wanted to inspect the meter panel in the switchboard room was confirmed by the defendant's witness, Mr Cheah. Mr Cheah said that he was called to the reception desk where he met a Chinese gentleman whom he identified as PW2. PW2 told him he wanted to inspect the meters. Mr Cheah then took PW2 to the meter box area.

[54] PW2 started the inspection by carrying out a visual test on the seal of the meter panel. He examined the meter panel for any damaged or broken parts. He explained that the meter panel consists of meters, cut-out fuses and a test terminal block. From his visual test he found that there were no damaged parts and the seal on the meter panel was intact. Then PW2 proceeded with the practical test. In order to do that, he had to cut open the TNB seals on the test terminal block, the meter terminal cover and also the cut-out fuses. He explained that on each meter there are three seals. For his purposes, he only needed to break the one seal which he found on the meter terminal cover. Having done that, he tested the potential terminals on each and every meter by using an electrical test pen ("test pen"). There were three potential coil terminals on each meter because this was a three phase wiring. His test revealed that on one of the phases the brightness of the test pen was not the same as for the other two phases.

[55] He used the test pen to determine whether there was a voltage or not. He touched each of the potential coil terminals with the test pen. PW2 also explained that if there is a voltage, the light on the test pen will light up. If there is no light, then there is no voltage. The purpose of having a voltage at the potential coil terminal is to activate the coil.

[56] He then touched all the potential coil terminals with the test pen. There were nine potential coil terminals altogether because there were three meters. Two of the three meters were for the same purpose ie, meters to register the number of kilowatts consumed. He referred to these two meters as the KWH meters. The third meter was a KVARH meter ie, a meter which is used to calculate the power factor. Of the two KWH meters, one was the main meter and the other was a check or test meter.

[57] PW2 checked the main KWH meter first. It was a three phase meter. At one of the phases the test pen showed a less bright light as compared to the two other phases of that meter. PW2 explained that each phase is identified by a colour ie, red, yellow or blue. It was at the red phase that the test pen showed a less bright light.

[58] The three phases ie, red, yellow and blue phases are individual phases and are not interconnected. The test pen at the yellow and blue phases showed a normal bright light. He felt something was wrong because of the difference in the brightness of the test pen.

[59] He then used the same test pen to check the check meter which also has three phases identified by the red, yellow and blue phases. The check meter showed the same result as the main meter ie, the red phase gave a slightly dimmer light in the test pen. The yellow and blue phases gave a normal bright light.

[60] He also tested the KVARH meter which also has three phases of red, yellow and blue. The result of the test was the same as for the other two meters ie, the red phase gave a slightly dimmer light than the yellow and blue phases.

[61] PW2 then proceeded to check the fuses of the red phase of each of the meters. He found that the fuses of the red phases were good.

[62] He then used another instrument called a volt meter to measure the voltage or pressure of each of the three phases of each of the three meters. He tested the main meter first. This was followed by the check meter and then the KVARH meter.

[63] When he used the volt meter to measure the voltage at the red phase terminal of the main meter, he found that it showed a very much lower voltage ie, 100 volts than at the yellow and blue phases in the main meter which gave a reading of 240 volts each.

[64] When he checked the check meter by using the same process, the result was the same as for the tests which he had done on the main meter ie, the red phase gave a reading of 100 volts and the yellow and blue phases gave a reading of 240 volts each.

[65] He did a similar test on the KVARH meter. The result of the test was the same as that which he had done on the main and check meter ie, 100 volts for the red phase and 240 volts each for the yellow and blue phases.

[66] He said it was not normal to have these types of readings. The readings for the voltage of each phase should be the same. Upon discovering that something was wrong, he proceeded to check the wiring of the meter circuit. He wanted to trace the voltage wire to ascertain whether the voltage wire, which comes in from the main supply line, was connected to the main meter terminal panel.

[67] Since he had detected something wrong at the red phase, he was looking for the red phase wire voltage to see where it was connected to. He explained that there is also a blue phase voltage wire and a yellow phase voltage wire. He also explained that each phase has a cut-out fuse. The red phase voltage wire should be connected to the cut-out fuse terminal of the main meter. He found that the red phase voltage wire was not connected to the red cut-out fuse terminal in the main meter.

[68] He found that the red phase voltage wire was connected to the test terminal block which is separate from the main meter and has nothing to do with the main meter. The test terminal block is meant for testing purposes only. It is situated below the two other meters.

[69] He also checked the yellow and blue voltage wires and he found that they led to the yellow and blue cut-out fuse terminals.

[70] Having found the fault, he rectified it there and then. He did this by removing the red voltage wire from the test terminal block and connecting it back to the red phase cut-out fuse terminal.

[71] After he had rectified the fault he tested all the three terminals in the main meter with the test pen. All three phases showed the same brightness in the test pen. He checked all the terminals of the two other meters with the test pen. He found that the brightness in the test pen for all the terminals of the three phases was the same in the main meter.

[72] He also conducted a voltage test in respect of all the three meters. The red phase of the main meter gave a reading on the voltage meter of 240 volts. The yellow and blue phases also gave a reading of 240 volts each.

[73] He did a similar test in respect of the check meter and the KVARH meter. All the three phases in each of these meters gave a reading of 240 volts each.

[74] He then tested the main meter disc (the "disc") to determine if it was running ie, rotating. He had observed visually the speed of the disc before the main meter was rectified. It was rotating at a slower speed. After he had rectified the faults in the main meter he found that the disc was rotating faster than before.

[75] After that he resealed the nine terminals of the three meters, the nine cut-out fuses, the test terminal block and the meter panel.

[76] He maintained that when he opened up the meters at the switchboard room of Wisma Taiko the defendant's chargeman, Mr Cheah was there. When he detected the fault and conducted the voltage test, he informed Mr Cheah, that something was wrong. He admitted that, apart from telling Mr Cheah that something was wrong, he did not tell Mr Cheah exactly what was wrong. He and his two assistants then did the rectification. Before leaving the switchboard room, he told Mr Cheah that he had rectified the fault and that the meter disc was moving faster than before. However, this evidence of PW2 has been disputed by Mr Cheah. In his witness statement, P37, Mr Cheah said he was doing his work while PW2 was inspecting the meter box area. Mr Cheah said PW2 told him in passing that there was some wrong wiring.

[77] PW2 then left Wisma Taiko and returned to his office. He then informed his engineer, PW3, Encik Jamal bin Abdul Ghani of the fault in the electrical wiring at Wisma Taiko and what he had done. PW3 instructed him to install a check meter to check the error. So on the following day PW2 went to Wisma Taiko. He brought along a check meter. After wiring it up to the meter box he left the check meter which he had brought to Wisma Taiko on the floor of the switchboard room.

[78] Subsequently, PW2 went back to Wisma Taiko once every few days for about two or three weeks. Each time PW2 would inform Mr Cheah that he was taking down the readings of the meters to make sure the meters were working properly by using the test meter. A recording was done of the readings taken from the main meter and the test meter, P24. From the readings collected from the two meters from 18 April 1992 until 26 May 1992, PW2 found that the recordings of the test meter disclosed that it was recording only two-thirds of the electricity current supplied by the plaintiff to Wisma Taiko. Then one fine day PW2 went to Wisma Taiko to remove the test meter and to take it away. Before leaving Wisma Taiko with the test meter he resealed the meter box.

[79] The court noted that when he was cross-examined by the learned defendant's counsel, (at pp. 56-73 of the Notes of Evidence) PW2 confirmed the existence of these two faults.

[80] The evidence of PW3, Encik Jamal bin Abdul Ghani, (at p. 28 of the Notes of Evidence) showed that PW3 had instructed his technician, PW2, to do an inspection or checking of the operational meters at Wisma Taiko. After having done that, PW2 informed PW3 that he discovered that there was faulty wiring at the meter at Wisma Taiko. According to PW3, PW2 told him that the red phase wiring at the voltage of the KWH meter was wrongly connected and that the wiring to the red phase, sources S1 and S2, on the test terminal block was also connected in reverse. SP3 explained to the court that the system used at Wisma Taiko is called the Current Transformer Operated three Phase Meter System ie, a meter which is operated on three Current Transformers (CT). The function of this meter is to record consumption of electricity on all the three phases of consumer load. These three phases are identified by their colours ie, red, blue and yellow.

[81] PW3 then instructed PW2 to install a test meter with the similar wiring situation or condition prior to the rectification of the meter at Wisma Taiko for the purpose of comparison in terms of recording the actual electricity consumption of the defendant. PW3 explained to the court that the purpose of this comparison was to check whether there was any difference between the readings of the meter after the faulty wiring was rectified and the test meter in which the faulty wiring was simulated. Having compared the readings of the corrected meter and the readings of the

simulated test meter, PW3 and PW2 found that there were differences in the two sets of readings which were recorded by the two meters. They discovered that the defendant was only billed for two-thirds of the actual electricity consumed by the defendant at Wisma Taiko. This means that the defendant still owes the plaintiff the tariffs for another one-third of the actual electricity consumed by the defendant.

[82] In his report to his superior, PW3 presented three methods in which he arrived at the basis for deriving the underbilling factor and the said amount.

[83] Method No. 1 is by installing another similar meter (called a test meter) into the existing meter system whose faulty wiring has now been rectified. The wiring of the test meter is carried out to simulate the faulty wiring conditions which originally existed in the main and check KWH meters.

[84] Method No. 2 is by comparing the consumption reading of the main KWH meter for a period just before the faulty wiring was rectified with the consumption reading of the same main KWH meter after the faulty wiring has been rectified.

[85] Method No. 3 is based on electrical principles. The electricity supply is given at three phases which are named as the red, yellow and blue phases. In an ideal condition, the load for each phase is balanced. The three loads will each produce a force and the resultant combination of the three forces will move the meter. But in the faulty wiring situation, there is no red phase voltage on the meter resulting in no force being produced by the red phase. This means only two phases, ie, the yellow and blue phases, produce forces which move the meter. If the wiring is not faulty, all three phases will move the meter.

[86] The evidence of the other witnesses for the plaintiff, namely, PW4, Jamal Abdul Nasir bin Abdul Manan and PW5, Ir Haji Mohd Yusof Senusi bin Khalidun, the superior officers of Jamal Abd Ghani, confirmed the findings of PW3, Jamal bin Abdul Ghani. Furthermore, when PW5, Ir Haji Mohd Yusof Senusi bin Khalidun forwarded a report to the plaintiff's legal department for its opinion, the plaintiff's legal department advised the plaintiff to charge the defendant for the underbilled portion in accordance with the law.

The Plaintiff's Submissions

[87] There was wrong wiring, that estoppel does not lie against the plaintiff and that the defendant is still liable to pay to the plaintiff the said arrears stretching over a period of five years and two months. The plaintiff relies on the following grounds:

[88] Firstly, according to the evidence adduced through the plaintiff's witnesses the wrongly connected wiring has been rectified by the plaintiff's officer and thereafter the meter readings show a substantial increase in the consumption of electricity by the defendant. Secondly the defendant has promptly made payment of all the electricity bills issued by the plaintiff to the defendant without further dispute.

[89] From the evidence adduced by the plaintiff's witnesses, it was clear that there were two wiring faults and the learned defendant's counsel did not challenge PW2's evidence about the faulty wiring in Wisma Taiko. During the cross-examination of PW3, the defendant's learned counsel also did not challenge the existence of the two faults. The learned defendant's counsel also did not dispute or deny the existence of both the errors relied upon by the plaintiff to issue the special bill for the balance of the actual electricity consumed by the defendant, namely, that the red phase wiring had been wrongly connected to the test terminal block and that there was reverse polarity.

[90] PW3's report, P24 ought to be accepted by the court because it was based on facts provided by the plaintiff's key witness, PW2, Chan Tuck Keong.

[91] There was evidence that several steps were taken by the plaintiff to determine the difference between the actual electricity consumed by the defendant and the amount which was underbilled by the plaintiff. Having done that the plaintiff was able to determine that the defendant was only billed for two-thirds of the actual electricity consumed by the defendant and thus the defendant owes the plaintiff the tariffs for the remaining one-third of the electricity actually consumed by the defendant but was underbilled by the plaintiff.

[92] It is significant that the defendant's second witness, DW2, did not deny the existence of the two faults relied upon by the plaintiff. DW2, confirmed the following:

(i) all meters were changed in December 1986; and

(ii) the inspection was done in February 1992.

[93] Furthermore, nowhere in DW2's evidence did he testify that he or the defendant denied the existence of the two faults relied upon by the plaintiff to issue the special bill to the defendant.

[94] The arrears of underbilling which was calculated by the plaintiff amounted to the initial sum of RM322,464. However, the plaintiff reduced that amount by 14% to the said sum of RM276,397.68 after giving some allowance for the imbalance in the loading of the red phase wiring.

The Defendant's Case

[95] The defendant's case is as follows:

[96] The defendant's first witness, DW1, who at the material time was holding the key to the switchboard room at Wisma Taiko did not enquire from the plaintiff's witness, PW2, as to the nature of the wiring fault which was discovered by PW2 in the defendant's meter box. DW1 has testified that he has 10 to 12 years of experience as the defendant's electrical chargeman. The failure on DW1's part to notify the consultant engineer, DW4, is not unreasonable because PW2 did not explain to DW1 the details of the wrong wiring. PW2 also did not show the wrong wiring to DW1.

[97] The defendant's 2nd witness, DW2, Yew Voon Chong has a Bachelor of Technology degree in electrical and electronic engineering. He was the Administration Executive of the defendant at the material time. According to DW2 when the defendant wrote to the plaintiff to enquire about the basis for the charging of the arrears, the plaintiff did not address the issue. When the defendant's management was informed by the plaintiff of the two wiring faults, the defendant's management could not believe that such a thing could happen because such a thing had never happened for the past 20 years and they had no reason to suspect that the monthly bills did not reflect the true monthly

consumption of electricity at Wisma Taiko. DW2 had received P3 from the plaintiff. DW2 then wrote to the plaintiff a letter, P6, after attending a meeting with the plaintiff on 6 August 1992, to state that by virtue of the six reasons as set out in the letter it was unfair that the defendant has to pay the initial sum to the plaintiff. The plaintiff then reduced the initial sum to the said sum but the defendant has denied liability and has refused to pay the said sum.

[98] The defendant *vide* its solicitors' letter dated 30 September 1992 resisted the plaintiff's demand to be paid the said sum on the ground that the defendant should not be held liable for this matter which is not its fault and there can really be no accurate manner in ascertaining the alleged consumption by the defendant.

[99] The defendant's third witness, DW3, Lee Thart Wah is the defendant's accountant. He only came to know of the faulty wiring and its rectification by the plaintiff after seeing the letter, P3. He agreed that after the rectification the defendant paid the monthly electricity bills without any objection because the defendant had no choice as the plaintiff had written to the defendant threatening to cut off the electricity supply if the defendant did not pay the electricity bill. He did not deny the existence of the two faults relied upon by the plaintiff to support its claim against the defendant.

[100] The defendant's fourth witness, DW4, Chew Chaw Fong @ Chow Chew Hoong, is the supervising engineer engaged by the defendant as a consultant on a part time basis since 1986 as required by the plaintiff's Electricity Supply Department of the plaintiff. DW4 visits the defendant's electrical installation once a month to see that the defendant's electrical installation complies with all the requirements of the Electricity Supply Department of the plaintiff.

[101] During cross-examination of DW4 by the plaintiff's learned counsel, DW4 agreed that there could have been some error in the wiring of the meter at Wisma Taiko and that the defendant did not deny or challenge the existence of the two errors. Nevertheless, the defendant doubts what was said by the plaintiff's witness, PW2, about the nature and extent of the two errors in his report because his report was prepared in a slipshod manner. It was also PW2's opinion based on his own theory.

[102] According to the defendant's witnesses, the function of the test pen is only to determine the presence or absence of electric current. If there is electric current the light will appear. If there is none, there will be no light. It is not true that the brightness of the light will indicate the amount of electric current present.

The Defendant's Submissions

[103] PW2 is not a truthful witness. The court ought not to accept his evidence of the two alleged faults. His evidence and the reports of PW3 and PW5 have been fabricated in order to justify the issuance of the special bill to claim the said sum from the defendant.

[104] The law does not allow the plaintiff to issue the special bill to claim for the said sum.

[105] Since the defendant is not responsible for the wrongly connected wiring the defendant is not liable to pay the said sum because it would not be feasible for the defendant to recover the said sum from its clients, that estoppel lies against the plaintiff because it is no longer a statutory body, that the decision of the Court of Appeal in the case of *Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd* [1998] 2 CLJ 740 ("*Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd (No. 2)*") applies to the facts in this case and that the defendant has promptly paid all electricity bills issued by the plaintiff to the defendant after the rectification by the plaintiff without further dispute because the plaintiff has threatened to disconnect the supply of electricity to the defendant's premises in the event the defendant fails to do so.

Issues For The Determination Of The Court

[106] The issues for the determination of the court are as follows:

(a) whether there were two faults in the electrical wiring on the defendant's premises at Wisma Taiko on 17 February 1992 ie, that the red phase wiring was wrongly connected and that the current transformer terminal was inversely connected;

(b) whether the calculation of the said sum was correct and reasonable based on the plaintiff's usual calculations;

(c) whether the plaintiff was legally entitled to issue the special bill to claim the said sum from the defendant; and

(c) whether the plaintiff is estopped from claiming the said sum from the defendant on the grounds of negligence and representation, and whether the defendant's defences of limitation and laches are also applicable in this case.

The Two Sub-periods

[107] As has been stated at the very outset of this judgment the plaintiff is claiming the said sum being arrears for under billing of actual electricity consumption for a period of five years and two months commencing from 13 December 1986 until 17 February 1992. Now, this period comprises two sub-periods. The first sub-period is from 13 December 1986 until 31 August 1990. I shall call this period of three years and eight months the "pre-corporatisation period". The second sub-period is from 1 September 1990 until 17 February 1992. I shall call this period of one year and five months the "post-corporatisation period".

[108] On 30 July 1990, which is one month before the 1990 Act came into force the 2nd five year contract for the supply of electricity to Wisma Taiko took effect upon the expiry of the 1st five year contract for the supply of electric power to Wisma Taiko. According to the plaintiff the alleged 100% inspection of the meter panel box at Wisma Taiko by PW2, the alleged discovery of the wrong wiring connection by PW2 and the alleged rectification by PW2 took place on 17 February 1992 which is one year five months after the coming into force of the 1990 Act.

[109] The plaintiff contends that the law which is applicable to the pre-corporatisation period is the 1949 Act and the 1949 Rules whereas the law which is applicable to the post-corporatisation period is the 1990 Act and the Licensee Supply Regulations 1990 (the "1990 Regulations").

[110] The plaintiff also contends that the 1st five-year contract and the 2nd five year contract must be construed in accordance with the law prevailing at the material time.

The Law

[111] Rule 8 of the 1949 Rules provides for the issuance of monthly bills by NEB in respect of electricity supplied to its consumers. Rule 16(2) provides that the reading of the consumer's meter shall be *prima facie* evidence of the amount of electricity

consumed by the consumer. Rule 17(5) provides that the Electrical Engineer can make adjustments to bills when he finds that the meter is not registering consumption correctly. The court agreed with the submission of the defendant's learned counsel that r. 17 applies in situations where the meter is not registering consumption correctly either because it is faulty or there is a wiring error.

[112] On 1 September 1990 the 1990 Act came into force.

[113] Section 24 of the 1990 Act provides as follows:

> 24. Duty to supply on request.
>
> (1) Subject to the following provisions of this Part and any regulation made there under, a licensee shall upon being required to do so by the owner or occupier of any premises -
>
> (a) give a supply of electricity to those premises; and
>
> (b) so far as may be necessary for that purpose, provide supply lines or any electrical plant or equipment.
>
> (2) Where any person requires a supply of electricity under subsection (1) he shall give to the licensee a notice specifying -
>
> (a) the premises in respect of which the supply is required;
>
> (b) the day on which the supply is required to commence;
>
> (c) the maximum power which may be required at any time; and
>
> (d) the minimum period for which the supply is required to be given.
>
> (3) Where a licensee receives from any person a notice under subsection (2) requiring him to give a supply of electricity to any premises and:
>
> (a) he has not previously given supply of electricity to those premises;
>
> (b) the giving of the supply requires the provision of supply lines or electrical equipment or plant; or

(c) other circumstances exist which make it necessary or expedient for him to do so,

the licensee shall, as soon as practicable after receiving that notice, give to the person a notice under subsection (4).

(4) A notice under this subsection shall -

(a) state the extent to which the proposals specified in the notice under subsection (2) are acceptable to the licensee and specify and counter proposals made by the licensee;

(b) state whether the prices to be charged by the licensee will be determined by a tariff under section 26(1), or by a special agreement under section 29(1) and specify the tariff or the proposed terms of the agreement;

(c) specify any payment which the person will be required to make under section 27(1); and

(d) specify any security which the person will be required to give under section 28.

(5) In this section and in sections 25 to 29 of this Part -

(a) any reference to giving a supply of electricity includes a reference to continuing to give such a supply;

(b) any reference to requiring a supply of electricity includes a reference to requiring such a supply to continue to be given; and

(c) any reference to the provision of a supply line or an item of electrical equipment or plant is a reference to the provision of such a line or item either by the installation of a new one or by the modification of an existing one.

[114] Regulation 3(1) of the 1990 Regulations provides that the licensee may recover from a consumer any charges due to him in respect of the supply of electricity.

[115] Regulation 3(5) provides, *inter alia*, that if a consumer has not after the expiry of seven working days from the making of a demand in writing by a licensee for payment thereof, paid all monies due from him in respect of the supply of electricity by the licensee, after the expiration of not less than three working days

A of notice of his intention, the licensee may cut off the supply of electricity to the premises by such means as he thinks fit and recover any expenses incurred in so doing from the consumer.

[116] Regulation 7 provides that any officer authorised by a
B licensee may at all reasonable times, on the production of any duly authenticated document showing his authority, enter any premises to which a supply of electricity is being given by the licensee, or by another licensee (wholly or partly) through the first-mentioned licensee's supply lines and electrical equipment, for any of the
C following purposes, namely:

(a) inspecting any supply line or electrical equipment belonging to the licensee;

(b) ascertaining the register of any electricity meter; or
D

(c) removing inspecting or re-installing any electricity meter or installing any substitute meter.

[117] Regulation 11(1) provides that the licensee shall provide
E and fix such meters as it considers necessary for the measurement of the supply of energy to a consumer.

[118] Regulation 11(2) as amended by the Licensee Supply (Amendment) Regulations 2002 provides that the reading of the consumer's meter shall be *prima facie* evidence of the amount of
F electrical energy consumed, provided that should the supply registered by the meter at any time is not equal to the energy consumed or the meter is not registering the actual consumption due to faulty installation, the licensee may make a charge for the supply of energy.
G

[119] Regulation 11(3) provides that in the event that the supply of meters at any time is not equal to the demand, the licensee may make a fixed monthly charge for the supply of energy.

H **[120]** The plaintiff is relying on reg. 3(1) and the amended reg. 11(2) to support its claim against the defendant on the ground that reg. 3(1) allows the plaintiff to recover from a consumer any charges due to him in respect of any electricity consumed and reg. 11(2) as amended allows the plaintiff to make
I a charge for the supply of energy where the supply registered by the meter at any time is not equal to the energy consumed or the meter is not registering the actual consumption due to faulty installation.

[121] The plaintiff contends that the plaintiff has a statutory duty to charge the defendant for electricity consumed by the defendant at the prescribed tariffs. On the authority of the decision of the Federal Court in the case of *Public Textiles Bhd v. Lembaga Letrik Negara* [1976] 1 LNS 120 this court ought to allow the plaintiff's claim with costs and to dismiss the defendant's counterclaim with costs.

The First Issue: Whether There Were Two Faults In The Electrical Wiring On The Defendant's Premises At Wisma Taiko On 17 February 1992 Ie, That The Red Phase Wiring Was Wrongly Connected And That The Current Transformer Terminal Was Inversely Connected?

The Second Issue: Whether The Calculation Of The Said Sum Was Correct And Reasonable Based On The Plaintiff's Usual Calculations?

[122] Since the first and second issues are interconnected the court shall deal with both the issues together. It is not in dispute that the plaintiff was at all material times solely responsible for the electrical wiring in the meter panel box which was installed by the plaintiff's agents or servants or employees at Wisma Taiko. There was clear and unchallenged evidence to show that the meter panel box was sealed with the seal of the plaintiff. So there was no way anyone including the defendant's servants, employees or agents could have tampered with the wiring in the meter panel box. There was also no allegation or evidence whatsoever forthcoming from the plaintiff's witnesses to show or indicate that there was any attempted tampering of the meter panel box as the plaintiff's witness, PW2, said he found all the seals to be intact.

[123] Since PW2 is the sole eyewitness to the wrongly connected wiring his credibility and the veracity of his evidence are of paramount importance. He has said that he was the one who broke the seals in the meter panel box at Wisma Taiko.

[124] Unfortunately for the plaintiff the court did not find PW2 a truthful witness. His evidence was inconsistent and unreliable. In the answers given by him to Question 21 to Question 26 in relation to P25A and P25B, PW2 only states one fault which he alleges he has rectified ie, "Red Phase wire for Test Terminal Block to PT Fuse". It is, therefore, extremely doubtful whether PW2 in fact prepared P25A and P25B. The reason is because even when he was referred to P25A and P25B during his initial examination-in-chief, he mentioned and explained one fault only.

[125] When he was asked by the court to explain in more detail the nature of the fault he told the court that it was all very technical and it would be too much for the court to comprehend. By answering in that manner the court understood him to mean that even if he were to do so the court would not be able to understand his evidence concerning the faulty wiring which he said he found. He only gave evidence of the second fault when the court gave permission for his further examination-in-chief, after the conclusion of his cross-examination and re-examination by the learned plaintiff's counsel. The court was not impressed at all with his testimony.

[126] PW2's evidence was also not corroborated by the plaintiff's engineer, PW3. The reasons are because firstly, PW3 did not personally see the two faults alleged by PW2 and secondly, PW2 did not take photographs of the two alleged faults to show to PW3. Yet in the report, P27, prepared by PW3 the two alleged faults were stated. Thirdly, PW2 did not call DW1 and the defendant's consultant engineer, DW4, to view the two alleged faults before he rectified the alleged faulty wiring. As mentioned earlier he only said he found the two faults in his further examination-in-chief. He said he rectified them right away. He then replaced the broken seals with new seals. Fourthly, he was also the only employee of the plaintiff to set up the alleged simulation of the wrongly connected wiring in Wisma Taiko and to install the test meter. He then filed a format. He then prepared his report, P26, for Mr Ho, his supervisor. P26 only mentioned one fault ie, "Red Phase CT wire S1 and S2 at test terminal block were at wrong polarity". P26 also stated that after the "Fault was rectified the meter was back to normal working condition".

[127] Fifthly, he did not produce to the court the format of his inspection on 17 February 1992. Sixthly, Mr Ho was never called to testify. Seventhly he said he also drew a diagram in order to explain the problem to PW3. Based on his format, report, P26, and his diagram, PW3 wrote a report, P27. But PW2's diagram and format were not attached to PWS's report, P27. They were also not produced in court to corroborate his testimony and to enable the court, the defendant's counsel and the defendant's expert witness to understand his testimony concerning the alleged wrongly connected wiring. The court drew an adverse inference

against the plaintiff pursuant to s. 114(g) of the Evidence Act 1950 for PW2's failure to produce the format which he said he had prepared and also the diagram which PW2 said he had drawn and also the broken seals. The court was of the considered view that if these items were produced they would contradict PW2's evidence and PW3's report, P27.

[128] Eighthly as a result of the failure of PW2 to produce the broken seals and to identify the broken seals, the plaintiff, the defendant and the court did not know who was the technician who had inspected the meter box and affixed those seals prior to the inspection which was conducted by PW2 and his two assistants on 17 February 1992 at Wisma Taiko. Ninthly, none of the plaintiff's witnesses could produce the file maintained by the plaintiff in respect of the defendant who is a large power consumer (the "LPC file"). None of the formats regarding the previous periodic inspections conducted by the plaintiff's technician at Wisma Taiko was produced in court. As a result of this failure and the failure of the plaintiff to produce the LPC file, the court agreed with the submission of the learned defendant's counsel that it was impossible to ascertain exactly what was the prevailing situation inside the meter box at Wisma Taiko on 17 February 1992 and prior to that date and what the previous technicians of the plaintiff did during their previous inspections.

[129] PW2 has not given any good reason why the rectification had to be carried out immediately without informing his superior, PW3 and the defendant's engineer, DW4, who was engaged by the defendant since 1986 as required by the plaintiff's Electricity Supply Department. PW2 himself has admitted that he had never seen such a mistake before in the connection of the wiring.

[130] Tenthly, the court noted the uniformity of PW2's and DW4's evidence concerning the location of the test terminal block. According to both of them the "test terminal block" is located at the meter panel. But in P25A and P25B, PW2 has shown the reversal of S1 and S2 at the "main bus bar" and not at the "test terminal block". The plaintiff's own witness, PW6, has stated that the main bus bar is at the switch box, but PW2 never gave evidence of doing any rectification work at the switch box.

[131] Apart from the reasons as set out above, PW3 has also admitted that his memo was based on P26. It is noteworthy that even at this point in time ie, one week after PW2 carried out the inspection of the meter panel and also rectified the alleged wrongly connected wiring at Wisma Taiko, there was only one fault which was mentioned in PW3's memo dated 25 February 1992 to PW4.

[132] It is further extremely significant that the heading of the memo mentions "mungkin kecurian" in Bahasa Malaysia or in English, possible theft of electricity. So it can be inferred by the court that at that point in time the plaintiff's engineers were still in the dark as to what had happened at Wisma Taiko. They appeared to only have in their mind or consideration the possibility of theft of electricity at Wisma Taiko. So the court could not rule out the possibility that they then proposed to recover payment for the alleged arrears by doubling ("2x") the consumption of electricity recorded by the meter at Wisma Taiko.

[133] There is a note by PW4 to PW3 which was written on the top of P29. It is an instruction dated 27 February 1992 by PW4 to PW3 to compare consumption of electricity at Wisma Taiko by simulation. It sets out the formula for the basis for the issuance of the special bill in order to enable the plaintiff to claim for the alleged arrears. It is, therefore, clear to the court that the plaintiff's engineers were trying to find a method in order to arrive at a factor which they could use in order to issue to the defendant the special bill.

[134] There is another serious matter. PW2 said he installed the test meter at Wisma Taiko to conduct tests from 18 April 1992 to 30 May 1992. He has relied on P24A to P24C. However, the document clearly shows that there was a delay of two months from the date of his inspection. This delay for the installation of the test meter has not been explained by him.

[135] The alleged readings on the main, check, and test meters respectively, were allegedly taken on various dates as shown in P24A to P24C. However, the identity of the test meter was challenged by the learned defendant's counsel. Despite the challenge, PW2 could not state the serial number of the test meter. He also could not produce the test certificate for the test meter ie, a certificate to state that it was properly calibrated and reading correctly before it was installed in Wisma Taiko.

[136] The court was of the considered view that he was not telling the court the complete truth of what he actually saw and did at Wisma Taiko and that it was more probable that he had been briefed by his superiors as to what to tell the court in order that his evidence would support the plaintiff's claim against the defendant. Therefore, the court disbelieved and rejected his evidence concerning the two faults.

[137] According to PW2 he simulated one fault by not connecting the red phase wire to the portable test meter. PW3 on the other hand in para. 3 of his report, P27, says that both faults were simulated on the portable test meter. PW5 in his letter, P3, to the defendant (p. 14, encl. 30) also maintained the stand taken by PW3 in P27. He, accordingly, said that both faults were simulated. But PW5 did not do the simulation tests. He has merely relied on the report of PW3 which the court has found to be unreliable. The court had the impression that PW3 and PW4 had relied on their theory and assumptions to make up for all the short comings of PW2's report in order to put up what they thought would be a convincing report for PW6.

[138] So it is only in theory that the court has heard the plaintiff's star witness say that if one phase eg, the red phase is not connected, only 2/3s of the electricity consumption will be recorded. That being the plaintiff's case the court agrees with the submission of the learned defendant's counsel that this whole exercise and the readings allegedly recorded by the test meter could have been fabricated by the plaintiff's witnesses in order to justify the basis for the issuance of the special bill. The court was of the view that it was possible for the plaintiff's witnesses to put figures as the test meter readings by deducting about 1/3 of the amount which is recorded by the main meter. Since the test meter could not even be identified by PW2 and the other witnesses for the plaintiff, the court agreed with the submissions of the learned plaintiff counsel that both the defendant's expert, DW4, and the plaintiff's own expert, PW6, have been deprived of the opportunity of viewing and examining the test meter, and having its accuracy tested. In the circumstance of the case the court also agreed with the submissions of the learned plaintiff counsel that the court could not just accept PW2's evidence that a test has been done with a "test meter" and accept those figures as correct, without the production of a test certificate on the

accuracy of the readings recorded by that meter, and without the serial number of the test meter being referred to for its identification.

[139] PW2's oral evidence is also contradicted by Mr Cheah's and DW2's evidence as regards the period a portable test meter was seen by him at Wisma Taiko. According to Mr Cheah it was shortly after the inspection on 17 February 1992. According to DW2 he saw it a few days after the inspection. The court found Mr Cheah and DW2 to be truthful witnesses. Their evidence was consistent throughout. There were no contradictions in their evidence.

[140] Furthermore, the quality and type of paper on which the test results were written gave the court the impression that the documents were not genuine or authentic. The documents looked dubious to the court and appeared to have been created hurriedly as an afterthought in order to attach liability on the plaintiff for the said sum. The court was of the considered view that it was more probable that TNB would have a more presentable format for test meter readings and fault reporting than those which were tendered to the court by PW2.

[141] It is very significant that the nature of the wrong wiring alleged to have occurred at the defendant's premises at Wisma Taiko has been described by practically every witness for the plaintiff, including PW5 and PW6, as unique because they have not come across such a case in their 15 or 20 years of service with the plaintiff before. PW2 described it as a "big mistake" by whoever who did it. PW5, the District Engineer for Kinta admitted that the technician who did the wrong wiring had committed an act of "gross negligence". The defendant's witness, DW4 found the alleged wiring faults unique and very negligent.

[142] The court has noted that there was no proper and contemporaneous report of what had actually transpired on 17 February 1992 at the defendant's premises at Wisma Taiko. There were also no photographs and accurate drawings of what were alleged to have been seen by PW2, at the meter panel box at Wisma Taiko. As stated earlier on, PW2 is the only witness of the plaintiff who is supposed to have seen the alleged wrong wiring. The report P27, is undated. It is also not addressed to anyone in particular. It was prepared by PW3. It sets out the

alleged wrong wiring even though PW3 did not see the meter panel box in the switchboard room in Wisma Taiko on 17 February 1992.

[143] In view of the matters set out above the court was of the considered view that the plaintiff has failed to prove on the balance of probabilities the existence of the two alleged faults in the meter panel box of the defendant at Wisma Taiko at the material time. It, follows, therefore, that since the basis for the calculation of the said sum has fallen apart, the plaintiff has also failed to prove that the said sum was correct and reasonable based on the plaintiff's usual calculations.

The Third Issue: If The Answers To The First And Second Issues Are In The Affirmative, Whether The Plaintiff Was Legally Entitled To Issue The Special Bill To Claim The Said Sum From The Defendant?

[144] Assuming for the moment that the court was wrong to so rule on the first and second issues the court was of the view that the law did not authorise the plaintiff to issue the special bill to make a retrospective claim for the arrears of one-third of the electricity allegedly consumed by the defendant and underbilled by the plaintiff for the two sub-periods.

[145] The reasons are as follows:

[146] The court agreed with and accepted the contention of learned counsel for the plaintiff that the law which is applicable to the pre-corporatisation period is the 1949 Act, the 1949 Rules and the decision of the Federal Court in the *Public Textiles Bhd*'s case whereas the law which is applicable to the post-corporatisation period is the 1990 Act and the 1990 Regulations. Apart from that the court also agreed with the contention of the learned counsel for the defendant that the decision of the Court of Appeal in *Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd (No. 2)* is applicable to the post-corporatisation period because the plaintiff is no longer a statutory body and, therefore, estoppel lies against the plaintiff.

[147] Rule 8 of the 1949 Rules provides for the issue of monthly bills only. The court has construed r. 17(5) of the 1949 Rules to mean that the plaintiff can only issue to the defendant a bill to claim for the arrears of electricity which it has undercharged the defendant for a period of one month prior to the period when the plaintiff's electrical engineer finds that the defendant's meter is not

registering the consumption of electricity correctly which is exactly what has happened here as alleged by the plaintiff. Regulation 4 of the 1990 Regulations also only allows the plaintiff to issue monthly bills. The court has construed reg. 11(2) of the 1990 Regulation to mean that the plaintiff can issue a bill for arrears of the actual electricity consumed which has been underbilled but as for the period concerned the court is of the considered view that reg. 12(4) is applicable.

[148] This means that the bill can be issued to claim for arrears for a period of one month only whereas here the plaintiff is claiming arrears for a period of one year and five months for the second sub-period. The reason is because if the legislature had intended to give the plaintiff the power to issue a special bill to cover a period of more than one month the legislature would have provided for this in clear terms. It is very pertinent to note that reg. 11(2) of the 1990 Regulations was amended in the year 2002 by the Licensee Supply (Amendment) Regulations 2002 which came into force on 15 December 2001. The new reg. 11(2) has clearly provided that the plaintiff can only make a retrospective adjustment for a period of three months from the date the consumer was informed of the overcharging or under-charging for the electricity supplied by the plaintiff to the consumer.

[149] Therefore, the defendant's defence of illegality ought to succeed.

The Fourth Issue: Whether The Plaintiff Is Estopped From Claiming The Said Sum From The Defendant On The Grounds Of Estoppel By Negligence And Estoppel By Representation, And Whether The Defendant's Defences Of Limitation And Laches Are Also Applicable In This Case?

[150] The court was of the view that the plaintiff is estopped from claiming the said sum from the defendant on the grounds of estoppel by negligence and estoppel by representation.

[151] The reasons are as follows:

[152] The court shall firstly look at the facts and the decision in the cases cited by learned counsel for both the parties. In the *Public Textiles Bhd*'s case, LLN had contracted to supply electricity to the appellants. By mistake LLN had considerably undercharged the appellants a sum of $84,624.01 (the "amount"). The appellants during the material times carried on a textile business in

Butterworth, Province Wellesley. They had entered into a contract with LLN to buy from it electricity energy at scheduled rates-at Tariff E - Fixed Block Industrial Tariff. Because at that time a two-way summation system was not available and because of the urgency of the appellants' need, a three-way summation system was installed. Since the factory is using two power transformers, a multiplication factor of 3/2 is required to ascertain the actual units consumed. If a two-way summation metering system is used, then a multiplication scale is not required, and a direct reading would show the actual units consumed. Due to an error of LLN's servants, the correct multiplication factor was not applied, thus the appellants were not rendered proper bills from the commencement of the contract ie, 16 December 1970, until the omission was discovered on 29 April 1972.

[153] Since there is no tag on the meters to advise meter-readers to make the necessary conversion of the readings, they naturally took a direct reading of the meters, the course applicable to a two-way summation metering system. Hence the error, thus resulting in under-billing the appellants. LLN therefore issued a supplementary bill to recover the difference between the amount for which the appellants had already been charged and paid, and the amount which should have been charged, had there been no error. LLN grounded its claim on *quantum meruit* and in contract. The appellants relied on the doctrine of estoppel by negligence and also estoppel by representation. The appellants also relied on the New Zealand case of *Taranaki Electric-Power Board v. Proprietors of Puketapu 3A Block, Incorporated* [1958] NZLR 297.

[154] LLN was successful in its claim against the appellants in the High Court. The learned judge distinguished *Taranaki's* case from the case before him both on the facts and in the provisions of the respective statutes.

[155] The learned judge rejected the appellants' argument and treated the case as governed principally by the decision of the Privy Council in *Maritime Electric Company, Ltd v. General Diaries Ltd* [1937] AC 610. He allowed LLN's claim because he felt constrained to do so by that decision. He held that LLN's duty to fix and collect reasonable prices for the supply of energy immediately took the case before him outside the ambit of *Taranaki*'s case and puts it fairly within the scope of *Maritime Electric Co Ltd*'s case. He, consequently, held that LLN was not estopped from claiming the amount although the appellants had

A utilised the accounts rendered by LLN for the purpose of costing their products. The reason was because, even if the facts justify an estoppel, he could not admit an estoppel as to do so would have the effect of nullifying the statutory provisions of the 1949 Act (Revised 1973).

B

[156] Being dissatisfied with the decision of the learned judge, the appellants appealed to the Federal Court. The Federal Court dismissed their appeal with costs.

C **[157]** Raja Azlan Shah CJ (as His Royal Highness then was) in delivering the decision of the Federal Court said as follows at p. 63 D-I, right hand column to p. 64, A-D, left hand column:

> In construing the Electricity Act, 1949, it is not correct to go by the criterion that it must be framed on principles of public policy
D ... The true test, as it seems to me, is the principle of public interest, that is, whether looking at the Act as a whole and particularly at the relevant provisions, it is framed for the benefit of some third party, or the state or public at large or a section of it. *We need to ascertain where the duty is imposed, for whose benefit it is imposed and why it has been imposed.* The point has been
E canvassed in *Kok Hoong v. Leong Cheong Kweng Mines, Ltd, supra.* I think it is not inexpedient to quote a passage from the speech of Viscount Radcliffe which expresses, in my view, the correct test (page 308):
>
> F It has been said that the question whether an estoppel is to be allowed or not depends on whether the enactment or rule of law relied on is imposed in the public interest or "on grounds of general public policy" (see *Re a Bankruptcy Notice*; (18) per Atkin LJ). However a principle as widely stated as this might prove to be rather an elusive guide,
> G since there is no statute, at least public general statute, for which this claim might not be made. *In Their Lordship's opinion a more direct test to apply in any case such as the present, ... is to ask whether the law that confronts the estoppel can be seen to represent a social policy to which the court must give effect in*
> H *the interests of the public generally or some section of the public, despite any rules of evidence as between themselves that the parties may have created by their conduct or otherwise.*
>
> *Applying that test, the Electricity Act does not appear to me to be founded on considerations of trade as for the benefit of the public*
> I *in general.* It is enacted to give the Board the sole monopoly in the Federation to generate, distribute and sell electric energy at reasonable prices. Indeed the learned judge in his judgment said that it is conceded by the

> defence that **the Board is a public utility operating under the Act**. It has a duty to perform - to assess the appellants for rates in accordance with Tariff E of the First Schedule to the Rules, no more, no less, for electricity actually supplied. Equally, the appellants have a corresponding duty to perform - to pay at scheduled rates, no more and no less, for electricity energy actually consumed. That is a statutory obligation for which the Board is responsible to the Minister who is in turn responsible to Parliament. *To waive the payment at scheduled rates is "prohibited not by the express or implied prohibition of the legislature but by the doctrine of ultra vires. In other words, if the plea of estoppel is allowed, the scheduled rates due in respect of the actual amount of electric energy supplied which are not irrecoverable, for it has been sued, would be indirectly remitted which the Board could not by any act directly remit. That would be nullifying the statutory provisions of the Act.*
>
> It seems to me that *our case amounts to no more than a reassertion and reapplication of the doctrine of estoppel as laid down in the Maritime Electric Company case and that the present situation is exactly within the language of Lord Maugham which is in conformity with a long line of previous decisions to be found in 15 Halsbury's Laws of England (3rd edn.)*.
>
> I would accordingly dismiss the appeal with costs. (emphasis added)

[158] In delivering the judgment of the Privy Council in the *Maritime Electric Go*'s case which reversed the judgment of the Supreme Court of Canada, Lord Maugham held that the correct approach to the problem which arose in the case was to first of all determine the nature of the obligation imposed by the statute and then consider whether the admission of an estoppel would nullify the statutory provision. The reason was because an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action but it cannot avail in the case before the Privy Council where the statute imposes a duty of a positive kind, not avoidable by the performance of any formality, for the doing of the very act which the plaintiff seeks to do. So it is not open to the respondent to set up an estoppel to prevent it.

[159] In that case, the appellant was a private company which sold electrical power in the City of Fredericton, New Brunswick. The company was, however, a "public utility" company within the meaning of the Public Utilities Act of New Brunswick. It was under a statutory duty to furnish reasonably adequate service and

facilities, and was strictly limited as to the rates, tolls and charges it could make, which must be in exact accordance with filed schedules open to public inspection. The respondent was a private company which carried on a dairy business in the same city. It manufactured and sold butter, ice-cream and other milk products. It bought electric energy from the appellant.

[160] The reading recorded by the meter dial was correct on 18 December 1929 ie, 106 kwh. However, in order to arrive at the correct amount of electric energy supplied it was necessary to multiply the meter dial reading by ten making it 1060 kwh. For this the correct charge according to the schedules would be $44.50 instead of the minimum of $15. Through error on the part of the appellant that was not done. As a result of the error the respondent was charged with only one-tenth of the electric energy supplied to them. The same error was made in compiling every one of the statements from 18 December 1929 to 16 March 1932.

[161] The respondent believed the said statements so rendered to be true and acted upon them. By reason of such belief the respondent paid to the farmers and others large sums of money, more than they would or could have paid for the said cream if the amounts claimed in the action by the appellant for electric energy had been rendered to and claimed from the respondent at the several times when the said statements were rendered by the appellant.

[162] In the action the appellant claimed the balance of nine-tenths, amounting to $1,931. The respondent pleaded that the appellants were in the circumstances estopped from recovering that balance. The appellant contended firstly that estoppel was barred or precluded by the provision of the Public Utilities Act. Secondly, that apart from the Act, there could be no estoppel since the representations contained in the monthly statements of account were not intended to induce any course of conduct on the part of the respondent other than the payment of the amounts stated to be due.

[163] The learned trial judge, Richards J in the King's Bench Division decided both points in favour of the appellant and gave judgment for the sum claimed. Grimmer ACJ, Baxter and Le Blanc JJ in the Appellate Division affirmed his decision.

[164] On appeal, the Supreme Court of Canada decided both contentions in favour of the respondent and reversed the judgment of the Appellate Division. Dysart J delivered the judgment of the Supreme Court of Canada. Duff CJ, Lament, Cannon and Davis JJ concurred with him.

[165] The only issue before the Privy Council was whether the appellant was estopped from recovering from the respondent the balance of the price of electric energy supplied by reason of their having omitted to charge the respondent for it in the monthly accounts which they rendered. There was no fact in dispute because the important facts were agreed upon by both parties. The error had arisen from a miscalculation of the proper amount on the basis of the figure shown on the meter.

[166] The Privy Council admitted that the agreed facts were of a very unusual character.

[167] Nevertheless, they held that the Supreme Court of Canada erred when it appeared to have attached great weight to the decisions of English Courts in relation to the Companies Acts and in particular in relation to the effect of s. 25 of the Companies Act 1867 which section led to much injustice and was finally repealed in 1900.

[168] According to the Privy Council, that section makes no attempt to affix a duty upon the company to exact payment from specific shareholders.

[169] At p. 624, Lord Maugham said as follows:

> ... In truth, the position of a shareholder is very widely different from that of a purchaser of electric energy who is bound by such a statute as the Public Utilities Act of New Brunswick ...

[170] In the early part of his judgment, Lord Maugham also referred to and reproduced s. 16 of the Public Utilities Act of New Brunswick as follows:

> Section 16 is in the following terms: "No public utility shall charge, demand, collect or receive a greater or less compensation for any service, than is prescribed in such schedules as are at the time established, or demand, collect or receive any rates, tolls or charges not specified in such schedules.

[171] At the bottom of the same page Lord Maugham also observed as follows:

> No *viva voce* evidence was given at the trial.

[172] This was followed by the following reference to s. 18 of the same Act:

> By s. 18 it is provided that any public utility company charging or receiving a greater or less compensation for any service rendered than that prescribed as provided by the Act is guilty of "unjust discrimination, which is thereby prohibited, and is made liable to a penalty. By s. 19 no person, firm or corporation "shall knowingly solicit, accept or receive any rebate, concession or discrimination in respect to any service in, or affecting or relating to, any public utility whereby any such service is by any device whatsoever, or otherwise, rendered free or at a less rate than that named in the schedules in force, as provided herein, or whereby any service or advantage is received other than is herein specified.
>
> A penalty is provided for the violation of this section.

[173] This court notes that the instant case can be distinguished from the *Maritime Electric Co*'s case on facts because in that case there was no fact in dispute as the important facts were agreed upon by both parties and no *viva voce* evidence was given at the trial. Furthermore, the agreed facts showed clearly that there was no mistake in the readings recorded by the meter dial. The only mistake was that the person who issued the monthly bill erroneously over looked to multiply the reading on the meter with the number '10' in order to obtain the correct figure so that the correct charge according to the schedules could be calculated. This resulted in the consumer in that case being charged with only one-tenth of the actual electricity supplied to it. In the instant case, there are serious disputes as to facts. The plaintiff has alleged that the reading of the meter dial was incorrect because of the two faults in the electrical wiring in the meter in the sealed meter panel box. This has been strenuously denied by the defendant. The court has made a finding that although there could have been some error in the electrical wiring the plaintiff has failed to prove the two alleged wiring faults.

[174] In the *Taranaki*'s case, an Electric-Power Board (the "Board") duly constituted under the provisions of the Electric-Power Boards Act 1925 filed an action to recover electricity

charges in excess of the monthly accounts rendered to a consumer. The relevant facts which appear in the headnotes are as follows:

> In 1950, the defendant, which operated a timber mill and joinery business, installed new electrical equipment in its premises. This work involved the installation of three current transformers, and, in due course, the defendant obtained the approval of the Board's engineer to their use. The responsibility for the connecting of the current transformers to the meter (which was already in operation on the premises) rested with the Board and not with the contractor; and the Board's chief inspector performed the necessary work. Shortly after the installation of the new equipment, the defendant's mill manager noticed that the accounts rendered by the Board for electricity were a great deal less than had been the case in the past. The mill manager drew the attention of the Board's inspector to that circumstance, and the inspector re-checked the wiring but detected no fault.
>
> In 1953, the Board's officers put in a check meter and discovered that the ordinary meter had become defective and it was replaced. On 24 April 1953, the Board wrote to the defendant asking for payment of £39 8s. which, it claimed, represented a fair and reasonable adjustment on the assumption that the defect in the meter had existed during the whole of the previous year. The defendant paid that sum to the Board.
>
> The defendant's mill manager drew the attention of the Board's inspector to the recordings on the internal meter (supplied by the Board) which seemed out of proportion to the total electricity supplied as recorded on the main meter. He reported this to the Board's chief inspector, who made a further inspection but did not detect anything wrong with the metering equipment. The defendant's accountant then decided to ignore the reading showing on the internal meter and to revert to the previous practice of apportioning the electricity charges between the firm's mill and the joinery department on a percentage basis. Further, the defendant rendered its income-tax returns on the basis that the Board's accounts for electricity were correct.
>
> In September, 1955, the Board's inspector decided to make another inspection of the defendant's metering equipment, and he installed three check meters so that each meter recorded separately the electricity passing through each transformer. He found that a cable from one of the transformers to the meter was wrongly connected, although the manufacturer's tag indicated that it was correctly placed. When this error was reported to the

A Board, it decided to conduct a series of tests extending over a period of months in an endeavour to determine how much electricity had, in fact, been consumed by the defendant. It satisfied itself that over the period from August 3 1950 to October 30 1955, it had been short-paid by the sum of £1,181 7s. 5d. The Board accordingly demanded this amount from the B defendant; and, upon liability being denied, an action for recovery for electricity charges in excess of the monthly accounts rendered to the defendant was commenced.

The defendant set up four defences to the Board's claim, namely, C estoppel either by representation or by negligence or both; illegality; limitation and the failure of the Board to establish with sufficient certainty the electricity supplied over the period in excess of the figures shown in its monthly accounts, in respect of which payment has already been made.

D The Supreme Court of New Zealand followed *Carr v. London and North Western Railway Co* [1875] LR 10 CP 307. It held that the defendant had established the necessary essentials of a successful plea of estoppel by representation although the facts in the *Maritime Electric Co Ltd*'s case which was strongly relied upon by the counsel for the Board, bore a resemblance to the facts in the E case before it.

[175] The court notes that the facts in the *Public Textile Bhd*'s case are similar to the facts in the *Maritime Electric Co Ltd*'s case.

F **[176]** In both cases the meter readings were correct. The error was on the part of the meter-reader concerned in not applying the correct multiplication factor to the meter readings. In the *Public Textile Bhd*'s case the multiplication factor was 3/2 and the amount underbilled was $84,624.01 for a period of one year and G four months from 16 December 1970 to 29 April 1972 when the error was discovered. In the *Maritime Electric Co Ltd*'s case the multiplication factor was 10 and the amount undercharged was $1,931 for a period of two years and three months from 18 December 1929 to 16 March 1932. There was no error in the H electrical wiring of the meter.

[177] The facts of the instant case are similar to those in *Taranaki*'s case. In the instant case the plaintiff has alleged that there were two errors in the electrical wiring of the meter which I has caused the defendant to be underbilled a sum of RM276,397 for the actual amount of electricity supplied to and consumed by the defendant for a period of five years and two months from 13

December 1982 to 17 February 1992. In the *Taranaki*'s case the Board which supplied the electricity alleged that because a cable from one of the transformers to the meter was wrongly connected the consumer had been undercharged a sum of £1,181 7s 5d for a period of five years and about three months from 3 August 1950 to 30 October 1955. Raja Azlan Shah FJ (as His Royal Highness then was) did observe in his judgment in the *Public Textile Bhd*'s case at p. 62F that *Taranaki*'s case turned on special facts.

[178] Had the plaintiff not been corporatised the court would have been bound to apply the decision of the Federal Court in the *Public Textiles Bhd*'s case and allow the plaintiff's claim against the defendant for the first and second sub-periods. However, since the plaintiff is already a corporatised body for the second sub-period, this court is bound to apply the decision of the Court of Appeal in *Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd* which upheld the decision of the High Court. (See *Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd* [1995] 1 LNS 244). Both the High Court and the Court of Appeal held that estoppel applied against Tenaga Nasional Berhad ("TNB"). Low Hop Bing J (as His Lordship then was) held that TNB was estopped from enforcing its claim against the defendant because it was TNB's obligation and legal duty to send correct electricity bills and 20% discount credit notes to the defendant, TNB at all material times knew that the defendant would rely upon the electricity bills and credit notes ("the documents") to make payment, the plaintiff had at all material times represented to the defendant that the 20% discount credit notes were valid, accurate, binding and irrevocable, the defendant was induced by the documents to make the monthly payments in full and final settlement of the electricity charges, the defendant had relied upon the discounted monthly electricity bills in ascertaining the price of its steel billets which had already been sold to customers and it was impossible for the defendant to claim any price variations from its customers.

[179] Being dissatisfied with the decision of the learned trial judge, TNB appealed to the Court of Appeal which dismissed TNB's appeal. Mokhtar Sidin JCA in delivering the judgment of the Court of Appeal held, *inter alia*, that it was inequitable if the respondent was required to repay the amount as claimed by TNB and that the learned trial judge had dealt with the issue of estoppel correctly and it could not be faulted.

[180] In *Dai-Ichi Electronics (M) Sdn Bhd v. Tenaga Nasional Bhd* [1996] 1 LNS 47; [1996] 4 MLJ 506, Vincent Ng J in allowing the plaintiff's application for an interlocutory injunction to restrain TNB from disconnecting the electrical supply to the plaintiff's factory and from demanding the instalment payments on two bills for a total sum of RM249,943.27 or enforcing the bank guarantee which was issued by the plaintiff to the defendant on 20 March 1995 had this to say at p. 512F:

> ... Be it noted that unlike in the past, TNB just like Syarikat Telekoms Malaysia are not only service oriented corporations but, quite rightly since their privatization, also profit oriented concerns as they would have to cater to the expectations of the shareholders. The logical implications of this would be that both such corporations would have to take their place like any other company under the Malaysian sun.

[181] Having considered the judgments which were delivered in the three decided cases cited above this court is of the respectful view that the decision of the NZ Supreme Court in the *Taranaki*'s case is also applicable to the instant case. The reasons are as follows:

[182] As stated earlier, the facts of the instant case are similar to those in that case.

[183] Here, it is an agreed fact that the two unit kwh three phase meters (one is a Main Meter and the other is a Test Meter) which were installed by the plaintiff at Wisma Taiko pursuant to Supply Contract No. 3748/85 were replaced on 13 December 1986 due to discrepancies in the reading between both meters which exceeded 3%. It is also an agreed fact that on 5 July 1990 a new contract No. 4794/90 was signed by both the plaintiff and the defendant (the "new contract"). It is also an agreed fact that the installation of the meters at Wisma Taiko was under the control and power of the plaintiff during the material time and was inspected by the plaintiff's representative from time to time.

[184] The court is of the view that the change of the two kwh three phase meters by the plaintiff, and the signing of the new contract for the supply of electricity by the plaintiff to the defendant, the issuance of monthly bills by the plaintiff under the new contract followed by due payment of the bills by the defendant, amounted to a representation by the plaintiff to the defendant of the existence of a certain state of facts ie, that the

new meters are recording correctly the monthly consumption of electricity by the defendant and that the monthly bills issued to the defendant under the new contract are correct.

[185] The court is also of the view that the representation was made in circumstances which would justify a reasonable person concluding that he was being invited to act on the representation in the normal or usual way in which a person would act in the particular circumstances, and that the representation was true; and the plaintiff must be deemed to have intended that the defendant, as a commercial and business concern, should act on the figures contained in the monthly bills by using the figures as an item of cost in determining what is an appropriate amount to charge its principals for the service which it provides to them, and also as an item of expenditure in the preparation of its annual income-tax returns.

[186] The court is also of the view that not only was the knowledge solely in the possession of the plaintiff because the meter was sealed by the plaintiff, but the defendant in the nature of things also had no possible means of verifying the accuracy or otherwise of the plaintiff's accounts as stated in the monthly bills issued out to the defendant by the plaintiff, and the defendant had throughout displayed the utmost frankness. The court is further of the view that the loss must fall on the plaintiff for the defendant has made out all the elements of a true estoppel, as the defendant acted on the representation in the ordinary course of its business in the belief that the monthly accounts were correct, and did so to its own damage.

[187] The court is also satisfied on the facts and circumstances of the instant case that the plea of estoppel on the ground of estoppel by negligence also succeeded on the following grounds:

[188] The plaintiff was guilty of culpable negligence because after the current transformers had been installed, the plaintiff's technicians and testing officers were negligent in failing to check whether the electrical wiring in the sealed meter panel box was connected correctly and also the accuracy of the readings of the meter. These acts of negligence resulted in representations being made in the transaction itself which were calculated to, and did, lead the defendant to believe that the monthly accounts were correct and that in acting on them the defendant did so to its damage.

[189] The plaintiff ought to bear the loss of the said sum because the plaintiff could reasonably have foreseen that if there were errors in the wiring in the sealed meter panel box installed in Wisma Taiko, it would cause the recording of the consumption of electricity recorded by the meter to be incorrect as the reading registered on the meter would not reflect the actual consumption of electricity by the defendant.

[190] Therefore, the defendant should have devised and implemented a check and balance system involving a schedule for periodic inspections of the meter by its servants or agents so that any error in the wiring in the meter could be discovered and rectified promptly.

[191] It is too late in the day for the plaintiff to attempt to pass its loss to the defendant and in the process to require the defendant to similarly pass the defendant's loss to the defendant's principals as a good 7 years and 11 months have elapsed from 13 December 1986 to the date of the filing of the plaintiff's writ on 14 November 1994 and the defendant would not be able to go backwards in time in order to reapportion and recover the arrears from the defendants' principals.

[192] If the plaintiff was only claiming for one month's arrears from the date of the inspection on 17 February 1992, the court might have found the plaintiff's claim reasonable. In fact, DW2, the Executive in charge of the defendant's administration has testified that the defendant was willing to pay for a month's arrears but this proposal was rejected by the plaintiff.

[193] Apart from what is stated above, the court is of the considered view that the plaintiff's claim against the defendant ought also to be dismissed because there are merits in the defendant's defences of limitation and laches.

[194] Here the plaintiff's claim dates back to 13 December 1986. But the plaintiff's writ was only filed on 14 November 1994 which is a good 7 years and 11 months later. The plaintiff's cause of action against the defendant is for breach of contract. The limitation period as provided for in s. 6(1)(a) of the Limitation Act 1953 is six years from the date the cause of action accrued. Here that date would be 13 December 1986. So the plaintiff's claim is clearly time barred. On this ground alone, the plaintiff's claim ought to be dismissed with costs.

[195] The plaintiff is also guilty of laches because there was an unduly long delay on the part of the plaintiff to discover the alleged wrong wiring in an area which is completely within its domain and which was also sealed off and not accessible to the defendant's workers and agents. Both the plaintiff and the defendant are companies doing business. In any business the object must be to do their trade professionally in order to supply its services as efficiently as possible to its clients in order to earn profits for the company and shareholders. It would be absurd if the plaintiff can make a mistake and keep it going for seven years and then just transfer its loss arising from its mistake to the defendant.

[196] Therefore, the court was of the considered view that it would be grossly unfair and inequitable to the defendant if the court were to order the defendant to pay the said sum to the plaintiff.

Conclusion

[197] In the premises the court dismissed the plaintiff's claim with costs and the defendant's counterclaim with no order as to costs. The court fixed the amount of costs at RM30,000 upon the agreement of both learned counsel.